

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the matter of	)	
	)	
Over-the-Air Broadcast Television	)	MB Docket No. 04-210
Viewers	)	

**COMMENTS OF PAXSON COMMUNICATIONS  
CORPORATION**

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## TABLE OF CONTENTS

	page
SUMMARY . . . . .	. ii
INTRODUCTION . . . . .	. 2
I. THE COMMISSION CANNOT END THE DTV TRANSITION UNTIL 85% OF VIEWERS CAN RECEIVE OVER-THE-AIR DTV SIGNALS. . . . .	. 3
II. MULTICASTING IS THE DTV FEATURE MOST LIKELY TO COMPEL VIEWERS WHO RELY ON OVER-THE-AIR BROADCASTING TO ADOPT DTV. . . . .	. 5
III. THE ONLY WAY FOR THE COMMISSION TO ACHIEVE 85% DTV PENETRATION IS BY REQUIRING FULL DIGITAL MULTICAST MUST CARRY WITHOUT FURTHER DELAY. . . . .	. 7
IV. THE COMMISSION'S MANDATORY BAND-CLEARING PROPOSAL WILL NOT ADVANCE THE DTV TRANSITION. . . . .	. 10
CONCLUSION . . . . .	. 13

## SUMMARY

The most important fact for the Commission to keep in mind in this and all of its DTV proceedings is that **Congress has forbidden the Commission to cut corners in trying to bring the DTV transition to a close.** At this point the Commission should be trying to foster an environment that encourages all viewers to seek out and adopt DTV equipment for its programming and it should be maximizing the opportunities for broadcasters to fully participate in the DTV transition, but instead it is using its valuable resources to determine the identity of the television viewers that continue to rely on over-the-air broadcasting when the statutes governing the end of the DTV transition make those viewers' identities entirely irrelevant. Instead of trying to count cable viewers against the statutory 85% threshold or proposing forced band-clearing, the Commission should be using the regulatory tools that Congress gave it to increase DTV penetration by fostering the growth of a DTV service that compels viewers to tune in. **The key unused regulatory measure that Congress has authorized that could accomplish this goal is full digital multicast must-carry and the Commission should order it without further delay!** Ordering full digital multicast must-carry will further the transition, but most importantly, it is the only resolution of the DTV must-carry issue that is consistent with the law.

In addition, the Commission should abandon the idea of forced band-clearing. A viable voluntary band-clearing system already has been approved and with only a few small alterations and the will to hold the full slate of 700 MHz auctions, that system still presents the fastest, surest option for clearing the 700 MHz bands. Forced band-

clearing, on the other hand, will lead only to litigation and delay – two things the DTV transition has had enough of already.

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Paxson Communications Corporation (“PCC”)<sup>1</sup> hereby submits its comments in the above-captioned proceeding addressing strategies for limiting the disruption of television service that the DTV transition will cause to households that continue to rely on over-the-air broadcasting service.<sup>2</sup> The most important fact for the Commission to keep in mind in this and all of its DTV proceedings is that **Congress has forbidden the Commission to cut corners in trying to bring the DTV transition to a close.** Rather than looking for short-cuts and gimmicks – like creative misreadings of the governing statutes or forced band-clearing – the Commission should be trying to foster an environment that encourages all viewers to seek out and adopt DTV equipment for its programming and it should be maximizing the opportunities for broadcasters to fully participate in the DTV transition. **The only regulatory tool the Commission has left**

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<sup>1</sup> PCC owns and operates one of the largest television station groups in America, as well as PAXTV, a full-service, family-friendly, over-the-air television broadcast network. PCC supplies programming to cable operators and DBS providers across the country through its owned and operated stations, its affiliates, and where no PAXTV signal is available over the air, through voluntary carriage agreements. PCC has been a leader in the DTV transition, constructing more than 40 full-service DTV television stations and leading the way in DTV multicasting, an idea that PCC pioneered and that now has become commonplace.

<sup>2</sup> Media Bureau Seeks Comment on Over-the-Air Broadcast Television Viewers, *Public Notice*, DA 04-1497, MB Docket No. 04-210 (rel. May 25, 2004) (the “Notice”).

to accomplish these goals is to order full digital multicast must-carry, and the Commission should do so without further delay. The time for playing games with the digital transition is over.

## INTRODUCTION

The *Notice* again reveals that the Commission's DTV transition policy is dangerously adrift at a time when focus and determination are absolute necessities. For no apparent reason, the *Notice* focuses primarily on identifying the precise demographic composition of those viewers that continue to rely on over-the-air television. **Of course, the Commission knows that a substantial percentage of American households – perhaps more than 40% – continue to rely on over-the-air service.** No one suggests that an overwhelming majority of US households rely exclusively on cable or satellite MVPDs for all the television service they receive and the Commission knows that as many as 30% of the televisions in US households continue to receive only over-the-air service. But the most important point is that there is no reason at all for the Commission's inquiry because Section 309(j) of the Communications Act is clear on its face that **the Commission must extend the DTV transition indefinitely in every market where 15% of viewers cannot receive over-the-air DTV signals from the broadcasters in their market.**<sup>3</sup> With the knowledge that 40% of households and more than 30% of televisions continue to rely on over-the-air television, the FCC knows enough to be sure that no market in the country is likely anywhere near the 85% penetration level necessary to end the DTV transition. Plainly most Americans continue to rely, at least in part, on over-

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<sup>3</sup> 47 U.S.C. § 309(j)(14).

**the-air television. It makes no difference who these viewers are; what's important is that there are far too many to end the transition.**

The Commission's task is to find a way to ensure that whoever they are, all viewers have the ability and incentive to seek out and adopt DTV services at a time of their choosing. The Commission fulfilled this duty on the equipment side when it just recently adopted its DTV tuner mandate, though that mandate doesn't even go into full effect until July 2007.<sup>4</sup> It is long past time for the Commission to follow up that action by ensuring that all those DTV tuners will receive a sufficient amount of new, exciting, and local DTV programming to induce consumers to replace their analog television sets with DTVs. **The only initiative the Commission has left with the potential to achieve this objective is full digital multicast must-carry.** By multiplying by as much as 6 times the amount of programming that viewers can receive over-the-air, full digital multicast must-carry is the one alternative available that really could convince over-the-air viewers to adopt DTV, thereby rendering analog television a thing of the past and ushering in the DTV era. **And here is the beauty of this solution: it is required by law!**

**I. THE COMMISSION CANNOT END THE DTV TRANSITION UNTIL 85% OF VIEWERS CAN RECEIVE OVER-THE-AIR DTV SIGNALS.**

The Commission's premise in the *Notice* is that it seeks to gather information about over-the-air television viewers so that it can recommend legislative changes to Congress that will enable it to bring about an early end to the DTV transition.<sup>5</sup> But

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<sup>4</sup> Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television, *Second Report And Order And Second Memorandum Opinion And Order*, 17 FCC Rcd 15978 (2002)

<sup>5</sup> *Notice* at 1.

Congress already has instructed the Commission to complete the transition and has given it ample tools to do so. The Commission must adopt rules and policies that encourage all viewers – particularly those who continue to rely on over-the-air broadcast television – to adopt DTV and it cannot end the transition until 85% of television households have done so.

Congress’s 85% DTV penetration threshold is perfectly clear. **Section 309(j) requires the Commission to extend the DTV transition in any market where more than 15% of households are incapable of receiving over-the-air DTV signals from the broadcasters in their market.**<sup>6</sup> The Commission itself has recognized that this threshold was designed to ensure that that “a significant number of consumers in any given market are not left without broadcast television service as of January 1, 2007.”<sup>7</sup> **Accordingly the statute does not permit the Commission to consider the transition complete based only on viewers’ ability to access broadcast channels over MVPDs – 85% of viewers must be capable of receiving an over-the-air signal.** Such a creative misinterpretation might give people the thought that the transition will be completed more quickly, but it would entirely contravene Congress’s intent to preserve free over-the-air television broadcasting and it would face obvious court action.

Congress’s aim in Section 309(j) is totally transparent: the statute was designed to assure the continuity of the over-the-air broadcasting system for as many viewers as possible throughout and after the DTV transition.

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<sup>6</sup> 47 U.S.C. § 309(j)(14).

<sup>7</sup> See H.R. Conf. Rep. No. 105-2015 (1997) (emphasis added). See also Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television, *Notice of Proposed Rulemaking*, 18 FCC Rcd 1279 ¶ 89 (2003).



Nowhere in the statute or the legislative history is there any suggestion that Congress considered the identity of the viewers that continue to rely on over-the-air television to be relevant, let alone decisive. Regardless of whether these viewers are rich or poor, urban or rural, white or non-white, educated or uneducated, the Commission is tasked to ensure that no market contains more than 15% of viewers that rely on over-the-air analog broadcast television. The Commission's request for specific demographic information regarding over-the-air television viewers is yet another detour to a dead end. **There are a variety of reasons people continue to rely on over-the-air television, and the only way the Commission is likely to get these viewers to transition to DTV is by ensuring that over-the-air DTV will be at least as vibrant and compelling as today's over-the-air analog broadcasting system.**

**II. MULTICASTING IS THE DTV FEATURE MOST LIKELY TO COMPEL VIEWERS WHO RELY ON OVER-THE-AIR BROADCASTING TO ADOPT DTV.**

Congress has given the Commission more than ample tools to create a DTV service capable of convincing viewers to make the transition – the Commission just has to use them. Already the Commission has used Congress's directives to distribute digital channels, to require construction of DTV stations, and to mandate DTV tuners in all television receivers, and to approve cable plug-and-play digital televisions. By permitting the Commission to distribute spectrum for advanced television services, Congress enabled the Commission to authorize a digital broadcasting system that provides improved picture and sound; that allows broadcasters to offer subscription and data services that heretofore have been impossible; and that allows broadcasters to vastly expand the amount of new diverse local programming available in every market through multicasting. Of these new capabilities, however, only multicasting shows great

promise for motivating those viewers that still rely on broadcast television to transition to DTV. **The Commission must recognize the centrality of DTV multicasting to a successful DTV transition and then use whatever regulatory tools are available to encourage as many broadcasters as possible to multicast.**

There are several reasons why multicasting is the DTV application most likely to encourage over-the-air viewers to transition to DTV. First, if several broadcasters offer multicast programming in a given market, the choices available free over-the-air would increase significantly. Those who either cannot afford the spiraling monthly fees for MVPD services or simply do not need 500 channels likely would still find this expansion of free choices compelling. Second, multicasting would provide viewers with *new* choices produced by *new* voices, many of which are likely to feature diverse, local programming, which the MVPDs by and large do not offer. Viewers that have been unimpressed by the additional choices offered by cable are more likely to be moved by broadcasters' new multicast fare. Third, because multicasting will provide broadcasters with additional revenue streams, the quality of their programming will be greatly improved. Over-the-air viewers will want to transition to DTV to take advantage of the higher quality programming they will receive. For these reasons, multicasting will be the key reason that those who rely on over-the-air broadcasting will switch to DTV.

In the past, the Commission has paid lip-service to the flexibility of DTV broadcasting, but has really has only encouraged the production and dissemination of HDTV. But HDTV has had its day and it has failed to move large numbers of over-the-air viewers to adopt DTV despite the fact that the networks have been broadcasting their highest quality content in HD for years. Moreover, there is no evidence that

viewers who rely on over-the-air analog programming will be induced to transition to DTV simply because of the improved picture and sound quality offered by HDTV. Indeed, because many if not most viewers originally adopted cable and satellite because it provided improved reception of broadcast signals, those who have yet to adopt MVPD services are those least likely to be impressed by HDTV's improved picture quality. Thus the Commission must recognize that DTV multicasting is the DTV application most likely to encourage over-the-air analog viewers to adopt DTV technology.

**III. THE ONLY WAY FOR THE COMMISSION TO ACHIEVE 85% DTV PENETRATION IS BY REQUIRING FULL DIGITAL MULTICAST MUST CARRY WITHOUT FURTHER DELAY.**

The 1992 Cable Act's Must-Carry provisions give the Commission the tool it needs to bring about multicasting and to persuade large numbers of over-the-air viewers to adopt DTV. As PCC has pointed out for the past six years, the transformative potential of multicasting will never be achieved until the Commission adopts full digital multicast must-carry. While over-the-air television viewers are a potential impediment to completion of the DTV transition, they are too small an audience to justify an investment in full digital multicasting unless broadcasters have assured access to the majority of viewers who rely, at least in part, on MVPD service.

Notwithstanding the Commission's preliminary findings to the contrary, PCC long has maintained that full digital multicast must-carry is mandated by Congress's requirement that the Commission ensure cable carriage of every local broadcast television signal in its undegraded entirety. The 1992 Cable Act not only fully anticipated digital must-carry, it anticipated the Commission's role in putting it into effect. Congress clearly directed the Commission to make rules regarding the *technical*

changes needed to ensure carriage and nothing more. Any Commission actions beyond this mandate are beyond the Commission's statutory authority and should be eliminated. The Act further provides that the Commission's DTV must-carry proceedings should "establish any changes in the signal carriage requirements of cable television systems necessary to insure cable carriage of broadcast signals of local commercial television stations which have been changed to conform with such modified standards."<sup>8</sup> The legislative history of this provision makes it abundantly clear that Congress intended the Commission to take whatever steps were necessary, from a technical standpoint, to insure that television broadcasters' digital signals (just as with their analog signals) are carried by local cable systems. The House Report interpreting the above language noted that:

The Committee recognizes that the Commission may, in the future, modify the technical standards applicable to television broadcast signals. In the event of such modifications, the Commission is instructed to initiate a proceeding to establish technical standards for cable carriage of such broadcast signals which have been changed to conform to such modified signals.<sup>9</sup>

The Commission's mandate was clear: make whatever technical changes are necessary to ensure continued mandatory carriage of local television stations in the digital world. This mandate from Congress was contained in the section of the must carry provisions of the 1992 Cable Act dealing with the technical aspects of must carry, (e.g., signal degradation). The placement of the digital must carry discussion in this same section is indicative of the Congressional intent that the question of must carry

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<sup>8</sup> 47 U.S.C. § 534(b)(4)(B).

<sup>9</sup> H.R. REP. No. 102-628, at 94 (1992).

was not at issue, just the technical aspects.<sup>10</sup> Any actions concerning cable carriage matters beyond such technical aspects of digital must carry were beyond the scope of the Commission's statutory mandate and must be eliminated. Any other policy matters regarding must carry are simply not permitted to be considered by the FCC under the 1992 Cable Act. **That is the law of the land!**

But even if the Commission continues to disagree with this reading of the statute, it cannot ignore the massive policy benefits that widespread multicasting would create in terms of increased diverse, local programming content and increased appeal to over-the-air analog television viewers. Indeed, multicast must-carry is *necessary* if the Commission is going to push DTV penetration beyond the 85% threshold without adopting creative misinterpretations of Section 309(j).

The Commission should stop pursuing diversions like the identity of those elusive over-the-air broadcast viewers and instead concentrate on using the tools Congress gave it to complete the DTV transition. **At this point the last and most important tool the Commission has is full digital multicast must-carry.** The Commission should stop its hand-wringing about legal challenges to multicast must-carry, do what the statute requires, and be off to court to defend the law. Congress gave the Commission the power to break the DTV impasse by ordering full digital multicast must-carry and the Commission has the responsibility to do so, no matter who threatens to sue them for following the law. If the Commission is too timid to defend the 1992 Cable Act, the broadcast industry will take up the challenge.

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<sup>10</sup> *Circuit City Stores v. Saint Clair Adams*, 121 S.Ct. 1302, 2001 U.S. Lexis 2459, \*24.

#### **IV. THE COMMISSION'S MANDATORY BAND-CLEARING PROPOSAL WILL NOT ADVANCE THE DTV TRANSITION.**

The *Notice* asks also asks whether the conversion of over-the-air viewers to DTV might be accomplished through mandatory 700 MHz band-clearing accompanied by a scheme that would require the winners of the 700 MHz auctions to finance the distribution of digital-to-analog converters to viewers who continue to rely on over-the-air broadcasting.<sup>11</sup> Although PCC takes no formal position on the general issue of subsidies for viewers' DTV conversion at this time, the Commission's proposed plan to use the 700 MHz auctions for that purpose should be rejected because it would likely lead only to more confusion and delay.

The Commission's original voluntary 700 MHz band-clearing plans were carefully developed over a period of several years.<sup>12</sup> The Commission long has recognized the importance of clearing the 700 MHz band and repeatedly stated its preference for market-based solutions and private negotiation for solving the relocation issue. In the initial formulation of those policies, it was presumed that broadcasters vacating channel allotments in the 700 MHz spectrum would be permitted to operate in analog on their digital channels for most of the DTV transition pursuant to waivers of the Commission's

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<sup>11</sup> *Notice* at 3.

<sup>12</sup> See, e.g., Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *Order on Reconsideration of the Third Report and Order*, WT Docket No. 99-168, FCC 01-258 (rel. Sept. 17, 2001); *Upper 700 MHz Third Report and Order*, 16 FCC Rcd 2709; Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 20845 (2000); Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *First Report and Order*, 15 FCC Rcd 476 (2000); Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *Notice of Proposed Rulemaking*, 14 FCC Rcd 11006 (1999); Reallocation of Television Channels 60-69, the 746-806 MHz Band, *Report and Order*, 12 FCC Rcd

short-spacing interference rules. The success of those policies, however, required that the FCC actually hold the full slate of 700 MHz auctions, which the wireless industry vigorously and consistently opposed because they did not want to pay fair value for the spectrum. The wireless industry's efforts at delay dealt a serious blow to the Commission's band-clearing efforts in the form of the Auction Reform Act of 2002, which rescinded the deadlines for holding the auctions and forbid the Commission from waiving interference rules to facilitate analog operation on digital allotments.<sup>13</sup> The Commission's band-clearing policies remain sound, however, and they should not be replaced by a forced relocation policy.<sup>14</sup>

Forced band-clearing would be unfair to both 700 MHz broadcasters and their viewers. 700 MHz broadcasters would be required to cease analog broadcasting before those broadcasters with in-core channels, depriving many viewers of relied-upon service. This also would place 700 MHz stations at a significant competitive disadvantage – a disadvantage that band-clearing payments could help to alleviate. The broadcasters in the 700 MHz bands are not typically major network affiliates or one of the top four stations in their markets. Thus these stations' financial and competitive positions are generally more precarious than those of their in-core competitors. Thus

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22953 (1998); Reallocation of Television Channels 60-69, the 746-806 MHz Band, *Notice of Proposed Rule Making*, 12 FCC Rcd 14141 (1997).

<sup>13</sup> See Auction Reform Act of 2002, Pub. L. No. 107-195 (2002).

<sup>14</sup> Although the Commission cannot waive its interference requirements to allow 700 MHz broadcasters to operate in analog on their DTV allotments, other alternatives exist for how the Commission could authorize termination of broadcasting on a 700 MHz channel prior to the end of the transition. For example, the Commission can and has allowed broadcasters to cease analog broadcasting on a 700 MHz channel and commence single-channel DTV service. See *Lenfest Broadcasting, LLC, Public Notice*, 17 FCC Rcd 19148 (2002). If the Commission were to hold auctions for the remaining 700 MHz licenses, many broadcasters would likely avail themselves of this opportunity if

mandatory band-clearing would act as a further handicap for stations that already have been stretched thin by a DTV transition that has required them to construct and operate digital facilities that most viewers are unequipped to receive and view. By weakening 700 MHz broadcasters, the Commission would only further sap the vitality of the over-the-air broadcasting service, which was never intended to be a consequence of the DTV transition. Indeed, the threat forced band-clearing poses to 700 MHz broadcasters is so grave that if the Commission adopts this hard-line position, the stations likely will have no choice but to resort to court action, which will only delay band clearing and the entire transition.

Moreover, even if the Commission felt it could justify the tremendous burden that mandatory, uncompensated relocation would place on 700 MHz broadcasters, it is unlikely that the auction winners would willingly subsidize viewers' transition to DTV equipment. In fighting against the 700 MHz auctions, the likely bidders for the 700 MHz spectrum showed their unwillingness to pay fair value for that spectrum. Moreover, the Commission itself noted many of the difficult issues involved in designing an adequate subsidy to ensure continuity of service.<sup>15</sup> These problems would be difficult for the government to solve equitably; leaving the solutions to numerous auction winners whose only interest would be in minimizing the amount of subsidies they would have to

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they were fairly compensated by the auction winners for the loss of their over-the-air analog audience.

<sup>15</sup> *Notice* at 3. A few of the difficulties the Commission noted included (1) who would be eligible for the subsidy; (2) whether converters for secondary televisions should be subsidized; and (3) whether MVPD subscribers should be given subsidies for the conversion of their televisions which are not hooked up to MVPD service.



pay is a recipe for evasion, litigation, and, widespread loss of relied-upon free, over-the-air broadcast television service.

In this case, the Commission's first impulse was best: upper 700 MHz broadcasters should be treated equitably and band-clearing should be a voluntary market-driven process. That process would still lead to a swift clearing of the 700 MHz bands if the Commission would hold the auctions necessary to put the process in motion. The quickest way for the Commission to clear the 700 MHz band and free up that large swath of spectrum for public safety and new wireless uses is the same as it was two years ago. The Commission should schedule the 700 MHz auctions for the earliest possible date and allow voluntary band clearing to take its natural course.

### **CONCLUSION**

**Instead of focusing on the identities of the many viewers who still rely on over-the-air television, the Commission should be attempting to craft a transition that gives every viewer an incentive to switch to DTV.** For the reasons described above, the Commission's course to the type of transition that Congress intended should be clear by now: (1) it must order full digital multicast must-carry without further delay; and (2) it should reschedule the 700 MHz auctions for the earliest possible date and maintain its voluntary band-clearing policies.

Respectfully submitted,

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